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**TITLE 327 WATER POLLUTION CONTROL BOARD**

**Proposed Rule**  
LSA Document #09-213

**DIGEST**

Adds [327 IAC 15-16](#) concerning concentrated animal feeding operations (CAFO). Repeals [327 IAC 5-4-3](#), [327 IAC 5-4-3.1](#), and [327 IAC 15-15](#). Effective 30 days after filing with the Publisher.

**HISTORY**

First Notice of Comment Period: April 8, 2009, Indiana Register ([20090408-IR-327090213FNA](#)).

Second Notice of Comment Period: August 11, 2010, Indiana Register ([20100811-IR-327090213SNA](#)).

Notice of Public Hearing: August 11, 2010, Indiana Register (DIN: [20100811-IR-327090213PHA](#)).

Change in Notice of Public Hearing: October 20, 2010, Indiana Register (DIN: [20101020-IR-327090213CHA](#)).

Change in Notice of Public Hearing: April 20, 2011, Indiana Register (DIN: [20110420-IR-327090213CHA](#)).

Date of First Hearing: May 11, 2011.

**PUBLIC COMMENTS UNDER [IC 13-14-9-4.5](#)**

[IC 13-14-9-4.5](#) states that a board may not adopt a rule under [IC 13-14-9](#) that is substantively different from the draft rule published under [IC 13-14-9-4](#), until the board has conducted a third comment period that is at least 21 days long.

**REQUEST FOR PUBLIC COMMENTS**

This proposed (preliminarily adopted) rule is substantively different from the draft rule published on August 11, 2010, at DIN: [20100811-IR-327090213SNA](#). The Indiana Department of Environmental Management (IDEM) is requesting comment on the entire proposed (preliminarily adopted) rule.

The proposed rule contains numerous changes from the draft rule that make the proposed rule so substantively different from the draft rule that public comment on the entire proposed rule is advisable. This notice requests the submission of comments on the entire proposed rule, including suggestions for specific amendments. These comments and the department's responses thereto will be presented to the board for its consideration at final adoption under [IC 13-14-9-6](#). Mailed comments should be addressed to:

LSA Doc. #09-213 (Confined Feeding Operations)

Janet Pittman

Rules Development Branch

Office of Legal Counsel

Indiana Department of Environmental Management

100 North Senate Avenue

MC 65-45

Indianapolis, IN 46204-2251

Hand delivered comments will be accepted by the receptionist on duty at the thirteenth floor reception desk, Office of Legal Counsel, 100 North Senate Avenue, Indianapolis, Indiana.

Comments may also be submitted by facsimile at the IDEM fax number: (317) 232-5970, Monday through Friday, between 8:15 a.m. and 4:45 p.m. Please confirm the timely receipt of faxed comments by calling the Rules Development Branch at (317) 232-8922 or (317) 233-8903.

**COMMENT PERIOD DEADLINE**

Comments must be postmarked, faxed, or hand delivered by September 2, 2011.

Additional information regarding this action may be obtained from Steve Mojonier, Rules Development Branch, Office of Legal Counsel, (317) 233-1655 or (800) 451-6027 (in Indiana).

**SUMMARY/RESPONSE TO COMMENTS FROM THE SECOND COMMENT PERIOD**

IDEM requested public comment from August 11, 2010, through September 24, 2010, on draft rule language as well as comments on the potential fiscal impacts of the rule. IDEM received comments from the following parties by the comment period deadline:

Christopher Surber (CS)

Timothy and Nikka Ogborne (TNO)

Ann Miller (AM)

Harold Wilson (HW)

Rev. Marian Patience Harvey (MPH)

Livestock and Poultry Rule Revision Group (LPRRG)

Following are the comments received during the comment period and IDEM's responses thereto:

*Comment:* Further regulations are in order to compel CAFO operators to pre-treat waste or establish on-site waste treatment facilities to create and maintain more hygienic practices. Evidence of this need is the recent problems in Randolph County, Indiana and Grand Lake, Ohio, and the recent importation of waste from Ohio that contaminated lakes there. (CS) (TNO)

*Response:* IDEM intends to incorporate the federal CAFO NPDES regulations and run the program in accordance with the federal program. At this time, pre-treatment of animal manure is not part of the program and IDEM does not intend to require pre-treatment.

*Comment:* All animal factory rules should be strengthened to include the following:

- (1) Mandatory yearly inspections of the factories and their lagoons for toxins and pathogens, Lagoon conditions and animal conditions.
- (2) Mandatory soils testing before and after land application of manure to make certain over-application does not occur.
- (3) Mandatory bonds by the animal factory owners to cover the cost of cleaning up polluted creeks, rivers and soils resulting from mis-application or over-application of liquid manure sewage.
- (4) Minimum setbacks for these factories should be two miles from any school, hospital, nursing home, or food facility (restaurants or groceries).
- (5) No new confined feeding operations should be built until all current ones are inspected and deemed to be free of disease, toxins, and improperly stored manure.
- (6) IDEM should be empowered to enforce the rules associated with confined feeding, and provided the funding and staff needed.
- (7) Fines should be levied for operators who pollute Indiana's water and air, and provisions should be included for neighbors to recover costs associated with rule violations.
- (8) No out of state manure should be allowed to be imported into Indiana from neighboring states.
- (9) All hog manure that cannot be applied via sub-surface soil application at the correct agronomic fertilizer rates should be treated as human sewage and disposed of in the same manner.
- (10) County and state roads should not be used as staging areas for loading mega-tankers with liquid manure, and road weight limits should be established and enforced to prevent the continued degradation of rural roads.
- (11) Citizens should have an avenue for legal recourse to recover costs for health problems, medical bills, loss of use of their property, and loss of property values due to neighboring animal factories. There should be a provision for litigation to recover the costs associated with living near animal factories that currently are exempt from air, water, trespass and nuisance codes. (AM)

*Response:* IDEM is adopting the federal NPDES regulations for CAFOs and intends to run the program in accordance with the federal program. In addition, the construction requirements for state CFOs apply to these operations. IDEM does not have the authority to ban out of state waste. The office of the state chemist (OSC) has the statutory authority to regulate the application of fertilizers, including animal manure for both in state and imported waste. OSC is currently working on regulations for fertilizer land application.

*Comment:* All confined feeding operations, regardless of size, must be included in this program. (HW) (MPH)

*Response:* This rule is for NPDES permits for operations defined as CAFOs under the federal program. IDEM is also currently revising its rules for the state CFO program, which regulates operations with fewer animals than those covered under the federal NPDES CAFO program. All operations defined as CFOs under Indiana law are regulated under the current CFO program.

*Comment:* All operators should submit manure application data at least twice a year, identifying sites where manure was applied and how much was applied. (HW) (MPH)

*Response:* CAFOs are required to submit an annual report to the commissioner that identifies the number and type of animals under confinement; the estimated amount of manure generated; the estimated amount of manure transferred to another person by the CAFO; and the total number of acres used for land application by the CAFO in the previous twelve months. Both soil and manure testing is required under the CAFO NPDES rule as well.

*Comment:* No manure should be applied on acreage with a phosphorus level greater than 200 parts per million. (HW) (MPH)

*Response:* CAFOs will not be allowed to apply manure to acreage with phosphorus soil test levels above 200 ppm.

*Comment:* Application of manure on frozen, snow-covered, or saturated ground is irresponsible and must be prohibited. (HW) (MPH)

*Response:* Land application on snow-covered or frozen ground is prohibited for all large CAFOS as defined at 40 CFR 122.23(b) and for any CAFO with a NPDES permit.

*Comment:* Setbacks from property lines and public roads are not sufficient. Suitable buffering boundaries must be determined with environmental professionals and people living nearby, not with the confined feeding

industry. (HW) (MPH)

*Response:* IDEM has taken comments from and met with people of all interests, not just the confined feeding industry. IDEM believes the setbacks contained in the rules are protective of the waters of the state, which is the primary purpose of the rule.

*Comment:* Persons proposing to acquire ownership of confined feeding operations by transfer should be required to meet good character requirements as determined by non-industry and non-government consultants. (HW) (MPH)

*Response:* The good character requirements of [IC 13-18-10](#) apply to any person who is constructing a confined feeding operation (CFO) as that term is defined in Indiana law ([IC 13-11-2-40](#)), or any person who is expanding the operation to increase either animal capacity or manure containment capacity. The statute does not provide authority for IDEM to require good character for permit transfers.

*Comment:* All confined animal feeding operations must provide cleanup assurances. (HW) (MPH)

*Response:* Presently, there are no bonding requirements for either CFOs or CAFOs in Indiana. Imposition of such assurances would require statutory authority.

*Comment:* Engineers must be licensed in Indiana. (HW) (MPH)

*Response:* For purposes of this rulemaking as well as the CFO rulemaking, any requirements that an engineer must sign off or attest to something specifically spell out that the engineer must be a registered professional engineer.

*Comment:* Exiting the NPDES program. The vast majority of operations which hold an NPDES permit are no longer required to do so because they do not discharge or propose to discharge. Many of those operations have either renewed their permits during the rulemaking process or have become newly permitted. Because those operations no longer need to maintain an NPDES permit but may be subject to several more years of regulation under the current permit, a process which allows them to exit the CAFO NPDES program while recognizing their previous application or renewal must be developed. It is necessary to include a provision establishing a streamlined procedure for these and other NPDES permit holders to exit the NPDES program and to maintain approval under the CFO program. Since the operations considering opting out of the NPDES program will have already undergone the permitting process and be valid permit holders, they should not have to go through another permitting process. All operations currently operating with NPDES permits are considered CFOs by Indiana Statute. Additionally, the application process for obtaining an NPDES permit, as well as the NPDES regulations, require that an operation be subject to the construction requirements of the CFO program. As such, a CAFO operator who is eligible to exit the NPDES program should have two options: retain the NPDES permit or revoke the notice of intent. If the producer elects to revoke the notice of intent, the facility should automatically enter the state CFO program. (LPRRG)

*Response:* IDEM agrees that a transition for those operations no longer required to maintain a NPDES permit under federal law is necessary as such operations would still fall under the state CFO program. Transition language has been added to the NPDES rule to allow for a streamlined transition into the CFO program.

*Comment:* General permits. We understand that EPA's stance toward Indiana's current general permitting structure necessitates the elimination of the general permit in its current form. However, we urge IDEM to consider the implementation of administratively issued general permits in the future. The general permit is useful where the operation to be permitted will adhere to a specific set of standards. In a regulatory environment where there is great uncertainty as to how EPA will administer these regulations, many producers may opt for an NPDES permit to avail themselves of that added protection. Since the possibility exists for an influx of these types of NPDES applications in the future, Indiana should consider streamlining the permitting process by implementing an administratively issued general permit. (LPRRG)

*Response:* IDEM is currently transitioning the NPDES general permit program from a permit-by-rule program to a program wherein the permits are administratively issued. IDEM plans to repeal the CAFO NPDES general permit and only issue individual CAFO NPDES permits to those sources requiring or seeking a NPDES permit. In the future, if the need again arises for a general permit for CAFOs, IDEM will consider reviving the NPDES general permit for CAFOs. If that occurs, the permit will be administratively issued.

*Comment:* Nutrient management plans. according to the Second Circuit Court of Appeals decision in *Waterkeeper Alliance, Inc. v. U.S. Environmental Protection Agency*, 399 F.3d 486 (C.A.2 2005), nutrient management plans must be subject to notice and comment provisions. Throughout the federal NPDES permitting process, there was much concern about whether agricultural operations would be able to maintain the flexibility needed to make adjustments to nutrient management and crop decisions based upon factors beyond the control of the farmer, such as delays in planting caused by wet weather. In the federal rule, two options were provided for nutrient management planning – the linear and narrative approaches. We propose that the state NPDES rule authorize the use of programs (computer applications) such as Manure Management Planner (MMP), developed at Purdue University, as a main component for nutrient management planning. For producers who do not use MMP as part of the narrative approach, they will have to provide more information as to how the calculations for nutrient rates will be completed, as well as other components of a nutrient management plan not covered or included in MMP. Producers using this approach will still be required to provide the methodologies that they use

to acquire all of the relevant nutrient data. (LPRRG)

*Response:* The federal rule does not prohibit the use of such programs as the Purdue program. It does, however, require the submittal of the methodologies used.

*Comment:* With respect to the notice and comment period for nutrient management plans, EPA has allowed for much flexibility by the states. We suggest that the rule allow for NMPs and comments to be submitted electronically. The notice and comment period for the initial submission of a NMP should coincide with the comment period for other provisions for the permit, such as construction approval. We suggest that this period should be thirty days in order to match federal requirements for the notice and comment period for an individual NPDES permit. (LPRRG)

*Response:* As the federal rules are being incorporated by reference, the requirements therein will apply. The NMP is initially submitted with the NPDES permit application and will be put on public notice at the time the draft permit is put on notice. However, a CAFO that requires a construction approval under State law will be required to comply with the requirements of [327 IAC 19-7](#). Specific language has been added to the CAFO rule to reflect this requirement.

*Comment:* For substantial modifications of the NMP, the notice and comment period needs to be reduced. This is because substantial modifications may result from time-sensitive issues which will require immediate action on the part of the farmer to be able to apply manure for crop needs. For substantial modifications, the time period should be seven days. We believe this is appropriate because the NMP will have already undergone one comment period and the number of changes should be few and require less time for review. For submission and notice with respect to NMPs and later substantial changes, we urge IDEM to consider the use of the internet as an appropriate method to expedite this time-sensitive process. (LPRRG)

*Response:* IDEM agrees that the comment period for such changes should be reduced from the standard 30 days if the NMP has already undergone public review and comment. IDEM has proposed a seven day comment period in the draft rule. The NMP changes will be posted on IDEM's web site for public review, just as draft permits are now.

*Comment:* Self certification. The federal CAFO NPDES rule contains a provision whereby livestock and poultry operations can self certify that they do not discharge or propose to discharge. This process should be simple and straightforward so that producers are able to achieve the added protection of the self certification. We believe that much if not all of what the certification is to accomplish can be shown by participation in the CFO approval program. Nonetheless, it is imperative that IDEM coordinate with EPA to satisfy any questions that exist with respect to the information needed and requirements to be met for completion of a valid self certification. (LPRRG)

*Response:* This particular portion of the federal CAFO NPDES rules has been struck down in a recent decision by the Fifth Circuit Court of Appeals [*National Pork Producers, et al. v. United States Environmental Protection Agency No. 08-61093 (5<sup>th</sup> Cir. 2011)*]. The current state of the federal law is that a NPDES permit is only required for a CAFO that is actually discharging. Because the "propose to discharge" language has been struck down, there is no need to include the self-certification language in the rule. That portion of the federal rules is not being incorporated into the rule.

*Comment:* The guidance for implementation of this rule should be developed with public input and comment so that the guidance is clear and producers who have CAFO NPDES permits will understand what is required of them to comply with the law. (LPRRG)

*Response:* IDEM will revise existing guidance as necessary. However, as this is essentially a federal rule, IDEM will not be developing guidance that contravenes existing federal rules or conflicts with federal guidance.

## **SUMMARY/RESPONSE TO COMMENTS FROM THE FIRST PUBLIC HEARING**

On May 11, 2011, the Water Pollution Control Board held the first public hearing/board meeting on new rules and amendments to rules at [327 IAC 15](#) concerning concentrated animal feeding operations. Comments were made by the following persons:

Livestock and Poultry Rule Revision Group (LPRRG)  
Justin Schneider, Indiana Farm Bureau (JS)  
Todd Janzen, Indiana Professional Dairy Producers (TJ)  
David Hardin, Indiana Pork (DH)  
Kristin Whittington, Landmark Enterprises (KW)  
Michael Veenhuizen, Livestock Engineered Solution, Inc. (MV)

Following is a summary of the comments received and IDEM's responses thereto:

### **General**

*Comment:* While we have reservations about losing the streamlined general permitting process for CAFOs, we appreciate IDEM's willingness to establish a future general permit process. We support the transition language in [327 IAC 15-16-3](#) for CAFOs opting out of the NPDES program. (LPRRG)

*Response:* IDEM will evaluate the need for CAFO general permits should the need arise to have such permits in the future.

*Comment:* We are at a disadvantage because guidance from EPA for implementing the rule has largely come from EPA and there has not been much information. We can only surmise how the rule may be interpreted. We ask that IDEM consider general permits for CAFOs if things change at the federal level and we find that more operations are required to obtain NPDES permits. (JS)

*Response:* IDEM will evaluate the need for CAFO general permits should the need arise. Currently, IDEM believes the state CFO regulations and NPDES individual permit requirements for discharging CAFOs provides a comprehensive and effective regulatory program within Indiana.

*Comment:* We are still concerned about overlaps between the CFO and CAFO rules. IDEM should consider our latest comments on LSA Document #09-615 as part of these comments where the state CAFO NPDES program incorporates CFO provisions. (LPRRG)

*Response:* IDEM considers all relevant comments during the rulemaking process. This rule and the proposed rules for confined feeding operations (LSA Document #09-615) were coordinated to provide consistency between the rules and produce a level playing field for all producers.

*Comment:* [327 IAC 15-16-1](#), [327 IAC 15-16-1](#)(d) states that a land application discharge that is not considered an agricultural storm water discharge requires an NPDES permit. The recent 5th Circuit decision in *National Pork Producers Council v. EPA* (No. 08-61093) greatly limits when a facility can be required to obtain an NPDES permit. The court's opinion states that the Clean Water Act mandates that "a discharging CAFO must have a permit," and a "discharging CAFO has a duty to apply for a permit." These are references to ongoing discharges of a CAFO. A one-time land application discharge for which the circumstances giving rise to the discharge have been corrected is no longer an ongoing discharge. Subsection (d) should be amended to read: ". . . CAFO owner or operator is a discharge *which may be* subject to NPDES permit requirements under this rule. . .". In addition, the concept of not requiring an NPDES permit for an isolated discharge which has been corrected should apply for incidents caused by events outside of manure application. (LPRRG) (JS)

*Response:* IDEM generally agrees that a one-time discharge from land application where the circumstances that caused the discharge have been corrected should not require the producer to obtain an individual NPDES permit. However, each case is fact-sensitive and must be evaluated on its own merits.

*Comment:* [327 IAC 15-16-5](#). This section incorporates [327 IAC 19-8-7](#) and [IC 4-21.5](#), neither of which refers to a list of "potentially affected persons." Instead of "potentially affected persons" the list should consist of those persons who would be in the notification area described in [327 IAC 19-8-7](#)(a)(2). (LPRRG) (TJ)

*Response:* The notice requirements of the Administrative Orders and Procedures Act ([IC 4-21.5](#)) remain in effect whether or not they are referenced in this rule. This section will be amended to reference the requirements of [IC 13-18-10-2](#), which is also found in draft [327 IAC 19-8-7](#), as well as those parties long considered potentially affected under administrative law decisions interpreting [IC 4-21.5](#), namely, land owners or occupants of land adjoining the property which is the subject of the permit.

*Comment:* [327 IAC 15-16-7](#)(d) and (e). We question whether the requirement in subsection (e) to meet the water quality standards of [327 IAC 5](#) is tempered by the standard in subsection (d) that an overflow may be allowed in certain cases. If it is not, how would a livestock producer know if the water quality standards are being violated? We do not see how a producer can meet the water quality standards during a significant rainfall or subsequent flood event during a 25 year, 24 hour storm event. The reference here should be to [327 IAC 2](#) which addresses water quality standards. This provision is a trap for a dairy producer who is allowed to discharge during a once in a lifetime event, but is required to meet water quality standards that cannot be complied with during that event. (LPRRG) (TJ)

*Response:* The reference to the water quality standards will be corrected. However, the water quality standards in [327 IAC 2](#) are established under Indiana law and cannot be set aside in this rule.

*Comment:* [327 IAC 15-16-7](#)(g). This subsection should be revised to read: "land application areas *owned or controlled by the* CAFO. . . ." This will clarify that the records are for the land which the CAFO controls as compared to land upon which manure that was marketed by the CAFO was land applied. (LPRRG)

*Response:* This provision does not apply to marketed manure. The section will be revised to clarify that it applies to land upon which the CAFO applies manure.

*Comment:* [327 IAC 15-16-9](#). The rule should identify clear and effective methods for preparing nutrient management plans. The most efficient way to manage the nutrient management plan submission requirements in the 2008 EPA CAFO Rule would be for IDEM to allow the use of programs like Purdue University's Manure Management Planner to serve as the submission of a "narrative approach" nutrient management plan. (LPRRG) (MV)

*Response:* The federal rule does not prohibit the use of such programs as the Purdue program. It does, however, require the submittal of the methodologies used. The language of this section will be amended to allow use of these applications.

*Comment:* [327 IAC 15-16-9](#)(j). This requirement is not clear in light of the language in 40 CFR 122.42(e) which requires that changes to nutrient management plans be submitted and the Director determines if those changes are substantial or not. Non-substantial changes must be made available to the public, while substantial changes require public notification and provision for public review and comment. People without the necessary

training or qualifications will try to pick those plans apart. Is the owner or operator required to submit all changes to IDEM, in which case will IDEM determine which ones are substantial? Or is the owner or operator required only to submit substantial changes? IDEM should provide clarification on what changes are considered substantial. (LPRRG) (DH)

*Response:* IDEM will revise the rule language to clarify that changes must be submitted to the Commissioner and IDEM will determine which changes are substantial and require public notice.

*Comment:* [327 IAC 15-16-9](#). IDEM should provide a capability for nutrient management plans, changes and public notices to be submitted electronically. Notification of approvals must be made quickly electronically or by telephone followed by written communication. Generally changes to the nutrient management plan occur because weather conditions force a change in crop planting. Those decisions take place in a short time period. Delays will negatively impact crop production and impair the farmer's profitability. (LPRRG) (DH)

*Response:* IDEM will allow for electronic submittal of changes. The public notice requirement in [327 IAC 15-16-9\(j\)](#) requires 7 days notice to the public. This requirement is derived from 40 CFR 122.42(e) and cannot be waived. Use of the "narrative rate approach" described in 40 CFR 122.42(e)(5)(ii) will include these adjustments and minimize the need for additional public notices.

*Comment:* [327 IAC 15-16-10\(c\)](#). Please clarify this subsection. (LPRRG)

*Response:* This language is standard reopener language required by EPA and the Clean Water Act for all permits. It precludes using the existence of a permit as an excuse to violate these rules.

*Comment:* [327 IAC 15-16-11](#). Subsection (a) references maintaining records for marketing and distributing manure. Subsection (b) discusses minimum acreage which must be available. If an operation markets its manure, the operation should be able to make such a showing and reduce the acreage required for land application. (LPRRG) (KW)

*Response:* Reducing the required acreage to account for marketed or distributed manure is provided for in [327 IAC 15-16-11\(b\)\(3\)](#). The missing language will be added.

*Comment:* [327 IAC 15-16-11\(b\)\(1\)](#). We do not believe that land use agreements for manure application should only be signed by the property owner, since a tenant farmer or farm manager may have the authority to contract for land application of manure. This subdivision should provide for the responsible party to enter into the land use agreement. (LPRRG) (TJ) (KW)

*Response:* IDEM agrees and will amend this language to allow signatures by persons in legal control of the property other than the property owner.

*Comment:* [327 IAC 15-16-12](#). In [327 IAC 15-16-8](#), under the requirements for design standards for manure storage structures, allowance is made for alternative designs to be used by those seeking NPDES permit coverage. This alternative approach should also be allowed for decommissioning manure storage areas. [327 IAC 15-16-12\(a\)](#) should read: ". . . must do so in accordance with [327 IAC 19-15](#) unless an alternative compliance approach has been approved by the commissioner." (LPRRG) (MV)

*Response:* This section references [327 IAC 19-15](#) for decommissioning of manure storage facilities. [327 IAC 19-5-1](#), as proposed in LSA Document #09-615, provides for alternate design or compliance approaches and innovative technology for all aspects of a confined feeding operation including decommissioning of manure storage facilities.

*Comment:* [327 IAC 15-16-13](#). While we appreciate the streamlined approach to transitioning from NPDES permit to state CFO approval, we are unclear about the timing. Is the intent for the transition to take place on the effective date of the rule, with notice submitted before then, or is there a date certain for the transition? We propose giving producers six months after the effective date of the rule to submit written notification to enter the CFO program. (LPRRG)

*Response:* This provision will be amended to clarify the transition requirements and provide a date certain for transition to the CFO program.

*Comment:* [327 IAC 15-16-13](#). If a current NPDES permit holder chooses to remain in the CAFO NPDES program, that producer should be allowed to finish out the term of the current NPDES permit before applying for a new individual NPDES permit. (LPRRG)

*Response:* An existing individual NPDES CAFO permit will remain in effect until its expiration date. An NPDES general permit expires on the date that the general permit rule ([327 IAC 16](#)) is repealed and will have no remaining term to "finish out". To maintain permit coverage, a CAFO that is discharging must obtain an individual NPDES permit if it is not already covered under one, and a non-discharging CAFO must transition to the CFO program in [327 IAC 19](#) or close. The transition language will be amended to clarify this.

[327 IAC 5-4-3](#); [327 IAC 5-4-3.1](#); [327 IAC 15-15](#); [327 IAC 15-16](#)

SECTION 1. [327 IAC 15-16](#) IS ADDED TO READ AS FOLLOWS:

## **Rule 16. Concentrated Animal Feeding Operations (CAFOs)**

**327 IAC 15-16-1 Purpose and applicability**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 1. (a) This rule:

- (1) incorporates by reference federal NPDES concentrated animal feeding operation (CAFO) regulations;
- (2) requires construction, operational, and land application standards for CAFOs; and
- (3) describes how to be removed from the CAFO permitting program.

(b) This rule applies to all of the following:

- (1) All CAFOs defined as CAFOs under 40 CFR 122.23(c) that discharge to waters of the state.
- (2) AFOs designated as CAFOs under 40 CFR 122.23(c) that discharge to waters of the state.
- (3) AFOs electing to be subject to this rule.

(c) An owner/operator of a facility listed in subsection (b) must obtain permit coverage under this rule.

(d) The discharge of manure, litter, or process wastewater from a CAFO to waters of the state as a result of land application of manure, litter, or process wastewater by the CAFO to land application areas under the control of the CAFO owner or operator is a discharge subject to NPDES permit requirements under this rule, except where it is an agricultural storm water discharge.

(Water Pollution Control Board; [327 IAC 15-16-1](#))

**327 IAC 15-16-2 Incorporation by reference**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 2. (a) The following are incorporated by reference, revised as of July 1, 2009, except as provided in subsection (c):

- (1) 40 CFR 122.21.
- (2) 40 CFR 122.23.
- (3) 40 CFR 122.42(e).
- (4) 40 CFR 122.63(h).
- (5) 40 CFR 412.

(b) Federal regulations that have been incorporated by reference do not include any later amendments than those specified in the incorporation citation in subsection (a). Sales of the Code of Federal Regulations are handled by the Government Printing Office, P.O. Box 979050, St. Louis, MO 63197-9000, or online at <http://bookstore.gpo.gov/>. The incorporated materials are available for public review at the offices of the department of environmental management.

(c) The following are exceptions to the incorporations by reference in subsection (a):

- (1) Delete the following phrases wherever they occur:
  - (A) "proposes to discharge".
  - (B) "or proposes to discharge".
  - (C) "propose to discharge".
  - (D) "or propose to discharge".
- (2) In 40 CFR 122.23(d)(1), delete "A CAFO proposes to discharge if it is designed, constructed, operated, or maintained such that a discharge will occur."
- (3) Delete 40 CFR 122.23(e)(2).
- (4) Delete 40 CFR 122.23(f) and substitute the following: Any CAFO that discharges must obtain permit coverage under paragraph (d)(1) of this section.
- (5) Delete 40 CFR 122.23(i).

**(6) Delete 40 CFR 122.23(j).**

(Water Pollution Control Board; [327 IAC 15-16-2](#))

**[327 IAC 15-16-3](#) Conversion of federal terms**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 3. When used in 40 CFR, as incorporated by reference in this rule, substitute the following unless otherwise indicated:

- (1) "Administrator" means the commissioner of the Indiana department of environmental management.
- (2) "Agency" means the Indiana department of environmental management.
- (3) "Director" means the commissioner of the Indiana department of environmental management.
- (4) "Environmental protection agency" or "EPA" means the Indiana department of environmental management.
- (5) "State", "authorized state", "approved state", and "approved program" means Indiana.
- (6) "United States" means the state of Indiana.

(Water Pollution Control Board; [327 IAC 15-16-3](#))

**[327 IAC 15-16-4](#) Definitions**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 4. The definitions in [IC 13-11-2](#), [327 IAC 5-1.5](#), [327 IAC 15-1-2](#), [327 IAC 19-2](#), and 40 CFR 122.23 and the following definitions apply throughout this rule:

- (1) "Agricultural storm water discharge" means a precipitation related discharge from a land application area where the manure, litter, or process wastewater has been applied in accordance with this rule and site-specific nutrient management practices to ensure the agronomic utilization of the nutrients in the manure, litter, or process wastewater as provided in 33 U.S.C. 1362(14) and 40 CFR 122.23(e).
- (2) "CFO approval" means a valid approval issued by the commissioner under [327 IAC 19](#).
- (3) "Manure storage area" means any area where manure is kept. The term includes, but is not limited to, the following areas:
  - (A) Lagoons.
  - (B) Runoff ponds.
  - (C) Storage sheds.
  - (D) Stockpiles.
  - (E) Under house or pit storage.
  - (F) Liquid impoundments.
  - (G) Static piles.
  - (H) Composting piles.
- (4) "NRCS 590 standard" means the Indiana Natural Resources Conservation Service (NRCS) Nutrient Management Conservation Practice Standard, Code 590, July 2001, available from the Natural Resources Conservation Service, Indiana Field Office, 6013 Lakeside Boulevard, Indianapolis, Indiana 46278-2933 or online at <http://www.in.nrcs.usda.gov/>. The standard may be viewed and copied at IDEM Office of Land Quality, 100 North Senate Avenue, Eleventh Floor, Indianapolis, Indiana.
- (5) "One hundred (100) year, twenty-four (24) hour rainfall event" means a twenty-four (24) hour precipitation event with a probable recurrence interval of once in one hundred (100) years, as determined using NOAA Atlas 14, "Precipitation-Frequency Atlas of the United States, Volume 2 Version 3.0", revised 2006\*.
- (6) "Overflow" means the discharge of manure or process wastewater resulting from the filling of wastewater or manure storage structures beyond the point at which no more manure, process wastewater, or storm water can be contained by the structure.
- (7) "Setback" means a specified distance from surface waters or potential conduits to surface waters where manure, litter, and process wastewater may not be land applied. Examples of conduits or potential conduits include, but are not limited to, the following:

(A) Open tile line intake structures.

(B) Sinkholes.

(C) Agricultural well heads.

(8) "Twenty-five (25) year, twenty-four (24) hour rainfall event" means a twenty-four (24) hour precipitation event with a probable recurrence interval of once in twenty-five (25) years, as determined using NOAA Atlas 14, "Precipitation-Frequency Atlas of the United States, Volume 2 Version 3.0", revised 2006\*.

\*Copies are available from the National Weather Service, Office of Hydrologic Development, 1325 East West Highway, Silver Spring, MD 20910 or online at <http://www.nws.noaa.gov/oh/hdsc/currentpf.htm>.

(Water Pollution Control Board; [327 IAC 15-16-4](#))

### **[327 IAC 15-16-5](#) Application requirements**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 4-21.5](#); [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 5. (a) The owner or operator of a CAFO must submit all of the following to the department:

(1) The application for an individual NPDES permit required by 40 CFR 122.21 and [327 IAC 5-2-3](#) on forms provided by the department.

(2) The NPDES permit application fee of fifty dollars (\$50) required by [IC 13-18-20-12](#). If this fee is not submitted, the permit application must be denied as provided in [IC 13-18-20-12\(b\)](#).

(3) The individual NPDES CAFO permit application fee of two hundred fifty dollars (\$250) required by [IC 13-18-20-11.5](#).

(4) A list of potentially affected persons in accordance with [IC 4-21.5](#) and [327 IAC 19-8-7](#).

(b) In addition to the requirements in subsection (a), when expanding the CAFO to increase animal capacity or manure containment capacity, the owner or operator must:

(1) obtain a separate construction approval under [327 IAC 19](#) by submitting:

(A) an application in accordance with [327 IAC 19-7-1](#); and

(B) the fee of one hundred dollars (\$100) required by [IC 13-18-10-2\(a\)\(5\)](#); and

(2) comply with the public notice and comment requirements of [327 IAC 19-8-7](#).

The department shall incorporate the construction approval into the NPDES CAFO permit.

(c) The department shall process the application in accordance with [327 IAC 5-3](#).

(Water Pollution Control Board; [327 IAC 15-16-5](#))

### **[327 IAC 15-16-6](#) Permit term and renewal**

Authority: [IC 13-13-5-1](#); [IC 13-15-1-2](#); [IC 13-15-2-1](#)

Affected: [IC 13-18-10](#)

Sec. 6. (a) A permit issued under this rule is effective for a period of five (5) years from the date the permit is issued by the department.

(b) To obtain renewal of coverage under this rule, the information required under 40 CFR 122.21 shall be submitted to the department no later than one hundred eighty (180) days before the expiration of coverage under the permit.

(c) The permittee must submit an application in accordance with section 5 of this rule to renew a permit.

(Water Pollution Control Board; [327 IAC 15-16-6](#))

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 7. (a) All permitted CAFOs must comply with the requirements of [327 IAC 19-3-1](#).

(b) Animals in any confinement area must not have direct access to waters of the state.

(c) There shall be no discharge of process wastewater pollutants to waters of the state, except as described in subsection (d).

(d) Whenever rainfall events cause an overflow of process wastewater from a facility designed, constructed, operated, and maintained to contain all process wastewater generated in addition to the runoff from a twenty-five (25) year, twenty-four (24) hour rainfall event for the location of the point source, process wastewater pollutants in the overflow may be discharged into waters, provided that the production area is operated in accordance with the additional requirements of 40 CFR 412.37(a) and 40 CFR 412.37(b).

(e) Any discharges by operations permitted under this rule are required to meet water quality standards under [327 IAC 5](#).

(f) Permitted CAFOs must meet the following requirements and effluent limitations for the CAFO production areas as of the date of permit coverage:

(1) There must be no discharge of manure, litter, or process wastewater pollutants to waters of the state.

(2) Whenever rainfall events cause an overflow of process wastewater from a structure designed, constructed, operated, and maintained to contain all process wastewater including the direct precipitation and runoff from a twenty-five (25) year, twenty-four (24) hour rainfall event for the location of the point source, process wastewater pollutants in the overflow may be discharged into waters, provided that the production area is operated in accordance with the requirements of subdivisions (3) through (7).

(3) Conduct weekly visual inspections of all of the following:

(A) Storm water diversion devices.

(B) Runoff diversion devices.

(C) Devices channeling contaminated storm water to the process wastewater and manure storage structure.

(D) Manure, litter, and process wastewater impoundments, noting the level in open surface liquid impoundments as indicated by the depth marker.

(4) Conduct daily inspection of all water lines that may come in contact with or impact manure, litter, or process wastewater in and around the production area. Such lines include drinking water lines for livestock.

(5) Correct any deficiencies found in inspections as soon as possible.

(6) Do not dispose of mortalities in a liquid manure or process wastewater system. Mortalities must be handled in such a way as to prevent the discharge of pollutants to surface water.

(7) Maintain, within the operating record required under section 12 of this rule, for a period of five (5) years from the date of creation, a complete copy of the following records:

(A) Records documenting self-inspections.

(B) Weekly records of the depth of manure and process wastewater in the open surface liquid impoundment, as indicated by the depth marker.

(C) Records of actions taken to correct deficiencies. Deficiencies not corrected within thirty (30) days of discovery must be accompanied by an explanation of the factors preventing immediate correction.

(D) Records of mortality management and practices.

(E) Records documenting the current design of any manure, litter, or process wastewater storage structures, including volume for solids accumulation, design treatment volume, total design volume, and approximate number of days of storage capacity.

(F) Records of the date, time, and estimated amount of any overflow.

(g) For the land application areas of CAFOs, the records described in [327 IAC 19-14-3\(f\)](#) must be maintained in the operating record for a period of five (5) years from the date of permit coverage.

(Water Pollution Control Board; [327 IAC 15-16-7](#))

#### **[327 IAC 15-16-8](#) Design, construction, and operational requirements**

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 8. All permitted CAFOs must comply with the requirements of the following:

- (1) [327 IAC 19-4](#).
- (2) [327 IAC 19-7-6](#).
- (3) [327 IAC 19-8-3\(b\)](#).
- (4) [327 IAC 19-10](#).
- (5) [327 IAC 19-11-1\(a\)](#).
- (6) [327 IAC 19-12](#), unless an alternative design or compliance approach has been approved by the commissioner under [327 IAC 19-5-1](#).
- (7) [327 IAC 19-13](#).

(Water Pollution Control Board; [327 IAC 15-16-8](#))

#### **[327 IAC 15-16-9](#) Nutrient management requirements**

Authority: [IC 13-13-5-1](#); [IC 13-15-1-2](#); [IC 13-15-2-1](#)

Affected: [IC 13-18-10-2.3](#)

Sec. 9. (a) CAFOs must conduct manure, litter, and process wastewater testing for nitrogen and phosphorus annually. Soil sampling and testing must be conducted at a minimum of once every three (3) years. Owners or operators may use the most recent data required under [327 IAC 19-7-5](#) to meet this requirement after the effective date of this rule.

(b) Owners or operators shall use the protocols listed in the NRCS 590 standard for sampling and testing of soil, manure, litter, and process wastewater.

(c) When developing the nutrient management plan required by 40 CFR 122.42(e), the owner or operator shall follow the Indiana Comprehensive Nutrient Management Plan Statement of Work, April 9, 2004, available from the Natural Resources Conservation Service, Indiana Field Office, 6013 Lakeside Boulevard, Indianapolis, Indiana 46278-2933 or the department, or available online at <http://www.in.nrcs.usda.gov/>.

(d) Manure application rates must be in accordance with [327 IAC 19-14-3](#).

(e) Except as otherwise provided under this section, application of manure, litter, and process wastewater must be in accordance with the setbacks [327 IAC 19-14-6](#).

(f) Manure, litter, or process wastewater must be applied to the land in accordance with [327 IAC 19-14-4](#).

(g) Land application sites must be inspected to identify any field tile outlets under or immediately bordering the land application site in accordance with [327 IAC 19-14-6](#).

(h) Spray irrigation must be done in accordance with the requirements in [327 IAC 19-14-5](#).

(i) Marketing of manure must be done in accordance with the requirements of [327 IAC 19-14-7](#).

(j) In accordance with 40 CFR 122.42(e), the department shall public notice substantial changes to the nutrient management plan for seven (7) days after receipt of the changes. The owner/operator may not implement the changes until after closure of the comment period and notification of approval by the department.

(k) Submittal of a nutrient management plan under this section by a CAFO that meets the requirements of this section satisfies the requirements of [IC 13-18-10-2.3](#) regarding submission of a manure management plan.

(Water Pollution Control Board; [327 IAC 15-16-9](#))

#### [327 IAC 15-16-10](#) Annual report and general conditions

Authority: [IC 13-13-5-1](#); [IC 13-15-1-2](#); [IC 13-15-2-1](#)

Affected: [IC 13-18-10](#)

Sec. 10. (a) Any person with a facility subject to this rule shall submit an annual report to the commissioner by February 15 of each year for the previous calendar year with the following information:

(1) The requirements listed in 40 CFR 122.42(e)(4).

(2) Information specified under [327 IAC 15-4-2](#) and [327 IAC 15-4-3](#) for any instance of noncompliance. If a spill occurs, the spill must be reported to the department within two (2) hours of discovery, in accordance with [327 IAC 2-6.1-7](#).

(b) All reports and information required to be submitted under this rule shall be signed and certified in accordance with [327 IAC 15-4-3\(g\)](#).

(c) It shall not be a defense in an enforcement action that an owner or operator would have had to halt or reduce the permitted activity in order to maintain compliance with the requirements of this rule.

(d) Samples and measurements taken for the purpose of monitoring shall be representative of the monitored activity.

(e) The owner or operator shall comply with the requirements of [327 IAC 5-2-14](#).

(f) The owner or operator shall give notice to the commissioner as soon as possible of any planned physical alterations or additions to the permitted facility when the alterations or additions would cause the facility to become a new source under 40 CFR 122.29(b).

(g) The owner or operator shall give notice to the commissioner of any planned change in the permitted facility or activity that may result in noncompliance with the requirements of this rule.

(Water Pollution Control Board; [327 IAC 15-16-10](#))

#### [327 IAC 15-16-11](#) Operating record

Authority: [IC 13-13-5-1](#); [IC 13-15-1-2](#); [IC 13-15-2-1](#)

Affected: [IC 13-18-10](#)

Sec. 11. (a) The following information must be included, maintained, and updated in the operating record:

(1) All valid permits, modifications, and notifications.

(2) The current annual report information required under section 10 of this rule.

(3) The current emergency spill response plan required under [327 IAC 19-13-4](#).

- (4) Marketing and distribution records for five (5) years under [327 IAC 19-14-7](#).
- (5) Updated calculation of minimum acreage required to meet land application requirements under this rule.
- (6) Maps required under [327 IAC 19-7-2](#).
- (7) Farmstead plan required under [327 IAC 19-7-3](#).
- (8) Records required under section 7 of this rule and [327 IAC 19-13-1\(d\)](#).
- (9) The storm water pollution prevention plan required under [327 IAC 19-11-1\(a\)](#).

(b) Access to a minimum number of acres for land application of manure, litter, or process wastewater must be maintained and documented in the operating record at all times based on the requirements in this rule:

- (1) Any acreage identified as part of the minimum required acreage for the application of manure, litter, or process wastewater that is not owned by the owner or operator of the CAFO must be documented in the operating record by land use agreements signed by the property owners on whose property the manure, litter, or process wastewater will be applied.
- (2) Copies of any written waivers related to reduction of the property line setback distances by adjoining property owners.
- (3) The amount of minimum acreage required to be accessible for land application may be reduced based on the amount of manure.

(Water Pollution Control Board; [327 IAC 15-16-11](#))

#### [327 IAC 15-16-12](#) Decommissioning, ceasing operation, and transfer of ownership

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2-40](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 12. (a) A CAFO that is decommissioning a manure storage area must do so in accordance with [327 IAC 19-15](#).

(b) A CAFO that is ceasing operation must do so in accordance with [327 IAC 19-16-3](#).

(c) Transfer of ownership of a CAFO must be done in accordance with [327 IAC 5-2-6\(c\)](#).

(Water Pollution Control Board; [327 IAC 15-16-12](#))

#### [327 IAC 15-16-13](#) Transition to the confined feeding operation program in [327 IAC 19](#)

Authority: [IC 13-14-8-1](#); [IC 13-18-10-4](#)

Affected: [IC 13-11-2-40](#); [IC 13-14-12](#); [IC 13-18](#); [IC 13-30](#)

Sec. 13. (a) A CAFO that is no longer required to maintain an NPDES permit but meets the definition of a CFO as of the effective date of this rule must provide written notification to the commissioner of its transition into the CFO program under [327 IAC 19](#).

(b) Coverage under [327 IAC 19](#) commences on the effective date of [327 IAC 19](#) and remains in effect for the duration of time the NPDES permit would have been in effect but in no case longer than five (5) years.

(c) Facilities that do not submit the notification required under subsection (a) shall submit the full application for CFO approval required under [327 IAC 19-7](#).

(d) Written notification under subsection (a) shall be on forms provided by the department.

(Water Pollution Control Board; [327 IAC 15-16-13](#))

SECTION 2. THE FOLLOWING ARE REPEALED: [327 IAC 5-4-3](#); [327 IAC 5-4-3.1](#); [327 IAC 15-15](#).

[Notice of Public Hearing](#)

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